IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5703 OF 2005

SHRI RAGHUNATH RAJARAM PATIL & ORS. .. PETITIONERS

Vs.

HARISHCHANDRA PANDURANG GAIKWAD & ORS. .. RESPONDENTS

Ms. Gauri Godse for petitioners
Mr. R. S. Ghadge for R-1 to 6

CORAM: SMT. RANJANA DESAI, J.
20/9/2005

ORAL JUDGMENT:

. Rule. By consent of the parties taken up for hearing forthwith.

2. The petitioners are opponents in Civil Miscellaneous Application No. 102/03. The said application is filed by respondents 1 to 3 under Section 276 of the Indian Succession Act, 1925 ("the said Act" for short) praying for grant of probate of the will of deceased Anandibai Kashinath Patil dated 23rd July, 1997. The petitioners filed their written statement contesting the claim of respondents 1 to 3. It is the petitioner’s case that the said Anandibai

died intestate and she had never executed any will.

3. On 6th August, 2004 the petitioners filed an application under Section 295 of the said Act, praying that necessary orders be passed for treating the probate proceedings as a suit and for necessary inquiry regarding the alleged Will and the question of title of the property in view of the written statement filed by the petitioners. The petitioners also prayed for transferring the said proceedings to the Civil Judge (S.D.) Panvel.

4. On 5/4/05 the petitioners filed application under Section 295 of the said Act read with Section 9 of the Code of Civil Procedure praying that point of jurisdiction may be framed and decided first. The District Judge Alibag by his order dated 22/7/05 rejected the said application and hence this writ petition.

5. I have heard the learned counsel appearing for the petitioner at some length. She has drawn my attention to Sections 276, 286 and 295 of the said Act and Section 28A of the Bombay Civil Courts Act, 1869. She submitted that in view of the fact that the petitioners have disputed the claim of the respondents the proceedings have become contentious and will have to be treated as a suit and in view of Section 28A of

the Civil Courts Act, 1869 it would be necessary to ascertain in which court the proceedings would lie and that will depend upon the pecuniary jurisdiction of the court. She submitted that though there is no inherent lack of jurisdiction in the District Court, if it entertains the probate proceedings the petitioners would lose their right of appeal. It was, therefore, necessary for the District Court to frame necessary issue as regards jurisdiction.

6. In support of her submissions the learned counsel relied on three judgments of this court. They are Mrs. Vera D. Thackersey v. Bai Manekbai Annasaheb Thackersey, AIR 1977 BOMBAY 419, Manohar son of Bapurao Sapre v. Bhaurao son of Tukaramji Shirbhate & Anr. AIR 1996 BOMBAY 29 and Shri Shridhar & Baba Keshav Phadke & Ors. v. Shri Shivram & Bal Keshav, 1997 BLR 744.

7. I have also heard learned counsel for the respondents. He submitted that since there is no inherent lack of jurisdiction in the District Court it is not necessary to interfere with the impugned order.

8. Section 276 of the said Act provides for petition for probate. Section 286 thereof states that the District Judge shall not grant probate or letters of

administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of

administration ought not to be granted in his court. Explanation to the said section state what "Contention" means. It states that contention means the appearance of any one in person, or by his recognised agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

9. Section 295 of the said Act says that in any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

10. It is clear, therefore, that the moment the probate proceedings become contentious they partake the character of a suit. Section 28A of the Bombay Civil Courts Act, 1869 which provides for power to invest Civil Judges with jurisdiction under certain Acts reads thus:

. 28A. "Power to invest (Civil Judges) with jurisdiction under certain Acts. -

(1) The High Court may be general or special order

invest any (Civil Judge), within such local limits and subject to such pecuniary limitation as may be prescribed in such order, with all or any of the powers of a District Judge or a District Court as the case may be under the Indian Succession Act, 1865, the Probate and Administration Act, 1881, or paragraph 3 of Schedule III to the Code of Civil Procedure 1908.

(2) Every order made by a (Civil Judge) by virtue of the powers conferred upon him under sub-section (1) shall be subject to appeal to the High Court or the District Court according as the amount or value of the subject matter exceeds or does not exceed (fifty thousand rupees).

(3) Every order of the District Judge passed an appeal under sub-section (2) from the order of a (Civil Judge) shall be subject to an appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals from appellate decrees.

11. There is no dispute about the fact that the Civil

Judge, Senior Division has been delegated the powers. In view of the fact that the petitioners have disputed the claim of the respondents, the proceedings are contentious and have to be treated as a suit and in view of Section 28A of the Civil Courts Act it would

be necessary to ascertain in which court the proceeding would lie and that may depend upon the pecuniary jurisdiction of the court. Though there is no inherent lack of jurisdiction in the District Court prima facie I find substance in the contention of Ms. Godse that in case it is found that the Civil Judge, Senior Division has jurisdiction, the parties would lose their right of appeal.

12. In Vera Thackersey's case application for letters of administration was made by the widow of the deceased in the District Court, Pune. The District Judge transferred the application to the Civil Judge, Senior Division, Pune. The mother of the deceased challenged the jurisdiction of the Civil Judge, Senior Division, Pune on the ground that he was merely a delegate of the District Judge and since the matter had become contentions the application should be returned to the applicant for presentation to the court of the District Judge under Section 288 of the said Act which provides for procedure to be followed by District delegate for return of the application, if

he feels that the petition filed before him should be returned to District Court. This court held that reading section 28-A of the Bombay Civil Courts Act, 1869 and R. 55(ii) of the Bombay High Court Rules (Civil Manual Vol. 1, 1960) there can be no doubt that the Civil Judge, Senior Division has been

invested with all the powers of a District Judge to take cognizance of any contested proceeding under the said Act, which may be transferred to him by the District Judge and the Civil Judge, Senior Division, to whom the application for grant of letters of administration is so transferred by the District Judge, could dispose of the same on merits irrespective of the fact that a caveat had been entered and the matter has become contentious.

13. In Shridhar Phadke's case (supra) the respondent therein filed a petition for probate in the court of Civil Judge, Senior Division, Pune, against the appellants therein. The appellants contested the proceedings and hence the Civil Judge, Senior Division treated them as a suit. Parties adduced evidence. The suit was decreed by the Civil Judge, Senior Division, by granting letters of administration. Being aggrieved by the said decree, the original defendants filed appeal before this court. The appellant contended that Civil Judge, Senior Division

had no jurisdiction to try the case since there was no transfer of proceedings by the District Court as required by law. This court referred to Section 28(A) of the Bombay City Civil Courts Act, 1869 and Rule 305(ii) of the Civil Manual Vol. I of 1986 under which the High Court empowers all the courts of Civil Judge, Senior Division with all the powers of a

District Judge, to take cognizance of any contested proceeding under the said Act that may be transferred to them by the District Judges. It was argued that there was no transfer of the application by the District Judge to the Civil Judge, Senior Division. It was held, in the facts of the case, that the plea of jurisdiction ought to have been raised at the earliest when the suit was registered and not 16 years after the proceedings were initiated. The court observed that since there was no inherent lack of jurisdiction and since only a procedural conferment of jurisdiction was not done, no interference was necessary. What needs to be noted from this judgment is that plea of jurisdiction has to be agitated at the earliest. In my opinion, therefore, the question of jurisdiction raised by the petitioners ought to be decided by the District Court, lest it would crop up at a later stage.

14. There is also some substance in the submission of

Ms. Godse, that though there is no inherent lack of jurisdiction in the District Court, depending on pecuniary jurisdiction, the petitioners may lose their right of appeal.

15. In Manohar Sapre's case (supra) the applicant had filed a petition for probate under Section 276 of the said Act in the court of Civil Judge, Senior Division,

Amravati. The petition was contested by respondent 1. The Civil Judge, Senior Division granted probate of the will. The respondents before the High Court preferred an appeal before the District Judge Amravati. Objection raised to the maintainability was repelled by the District Judge. The District Judge reversed the order passed by the Civil Judge, Senior Division, Amravati.

16. This court considered the relevant provisions of the Civil Manual, the said Act and Section 28(A)(i) of the Bombay Civil Courts Act 1869 and observed that under the said Act, the said matters may be adjudicated by the District Judge or the Civil Judge, Senior Division to whom such proceedings have been transferred. Once the Civil Judge, Senior Division has exercised the jurisdiction over the application filed by the petitioner for grant of probate of the will having valuation of Rs.10,000/- in view of the

provisions contained in Section 29-A of the Bombay City Civil Courts Act, 1869, the appeal lay against such order passed by the Civil Judge, Senior Division, to the court of the District Judge.

17. In my opinion, in view of the above it was necessary for the District Court to frame the issue as regards jurisdiction and decide it. Hence the following order;

a) The impugned order dated 22nd July, 2005 passed below Exhibit 31 in Civil Misc. Application No. 102/03 is set aside. Application Exh. 31 stands allowed.

b) The District Judge is directed to frame the issue of jurisdiction and decide it in accordance with law after hearing the parties.

c) It is clarified that the District Judge should decide the issue independently. Anything said by me in this order may not be treated as final expression of opinion, on the question of jurisdiction.

d) Petition is disposed of.

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